

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-191165

DATE: May 18, 1978

MATTER OF: Davey Compressor Company

DIGEST:

Protest is untimely where not filed with GAO within 10 days of advice to protester of agency's firm position that protester was not eligible for award of labor surplus set-aside portion of solicitation. Questions whether protester possessing necessary requisites for certification on date of bid opening but not certificate itself may be considered eligible concern and whether requirement for certification goes to responsiveness or responsibility are not significant issues.

The Davey Compressor Company (Davey) has protested an award by the Defense Construction Supply Center (DCSC) of a contract to the Bauer Compressor Company (Bauer) under the set-aside portion of invitation for bids (IFB) No. DLA-700-77-R-1170 issued by DCSC on May 18, 1977.

The solicitation was a 50-percent labor surplus area set-aside for the purchase of diesel-powered, reciprocating compressors with bid opening on September 20, 1977. Davey was awarded the contract for the non-set-aside portion of the procurement. Davey's priority for award of the set-aside portion was questioned, however, because of uncertainty concerning Davey's representation of itself as a certified eligible concern with a first preference. Upon request, Davey submitted a copy of its certification which was dated October 19, 1977, approximately 27 days after bid opening. The contracting officer determined that in these circumstances, Davey's representation of its status as a certified eligible concern could only be recognized if greater than 25 percent of the con-

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tract price would be incurred as manufacturing or production cost by certified eligible firms among the 40 facilities listed by Davey at which some of the work would be performed. This question was the subject of a meeting on December 6, 1977, between counsel for the protester and a representative of the procuring activity. On December 9, 1977, counsel for Davey was advised that it was the Government's firm position that Davey was not entitled to priority as a certified eligible concern with a first preference and that Davey should proceed to protest if it desired to do so. Davey's protest to our Office was filed on January 27, 1978.

Davey contends first that it should be considered as a certified eligible concern with a first preference because it possessed the necessary prerequisites as of the bid opening date and the bid package contained no warning to bidders regarding the consequences of failure to be certified as of the bid opening date. Davey also argues that its failure to be certified by the bid opening date should be considered a matter of responsibility and not responsiveness.

The initial question for our consideration is the timeliness of Davey's protest under our Bid Protest Procedures, 4 C.F.R. part 20 (1977). Davey contends that its protest is timely because the actual award to Bauer was not made until January 20 and Davey protested promptly thereafter. The DCSC, however, contends that Davey's protest is untimely because it was not filed with our Office within 10 days of advice to Davey of the Government's position.

We agree with DCSC. Section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20.2(a) (1977), requires that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of notice or knowledge of the initial adverse agency action thereon. Section 20(b)(2) of our procedures, 4 C.F.R. § 20.2(b)(2) (1977), requires that protests be filed "not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

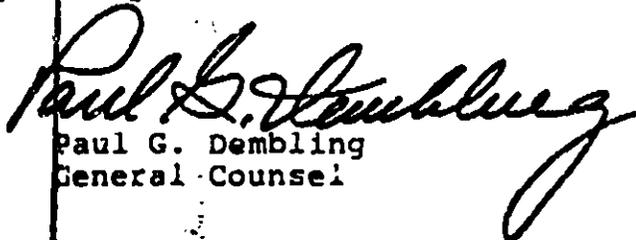
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The record is not entirely clear as to the exact character of the meetings between counsel for Davey and DCSC. We do not find it necessary, however, to determine whether Davey filed a protest with DCSC prior to initiating its protest with our Office since under either of the above-cited sections of our Bid Protest Procedures, Davey's protest to us is untimely. If we regard Davey's contacts with the DCSC as the initiation of a protest to the agency, then DCSC's statement on December 9 of a firm position contrary to Davey's interests constitutes an "initial adverse action" with regard to Davey's protest. Alternatively, if we consider the meetings as not involving the initiation of a protest by Davey to DCSC, then the agency's December 9 statement to Davey of a firm position denying Davey's eligibility as a certified concern must be considered as notice to Davey of the basis of its protest. Under either interpretation, Davey's protest should have been made to our Office within 10 working days of December 9, or by December 23, in order to be timely.

Since Davey's protest was not filed with our Office until January 27, 1978, it is untimely and not for consideration on the merits.

Davey also argues that its protest involves a significant issue and should be considered notwithstanding that it is untimely. We do not agree. We regard a significant issue as one involving a procurement principle of widespread interest or going to "the heart of the procurement process." Willamette-Western Corporation, et al., 54 Comp. Gen. 375 (1974), 74-2 CPD 259; 52 Comp. Gen. 20 (1972). We perceive no such importance in the present matter.

Accordingly, the protest is dismissed.


Paul G. Dembling
General Counsel